Client Alert

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Know Before You Sell: CFPB Letter on "Know Before You Owe" Implementation

By Donald C. Lampe and Leonard N. Chanin

In response to a written request from the Mortgage Bankers Association (MBA), Richard Cordray, Director of the Consumer Financial Protection Bureau (CFPB), penned a response dated December 29, 2015, addressing implementation of the Truth-in-Lending Act (TILA)- Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure Rule (known as TRID) (the "Rule").[1] The Director responded to MBA's concerns that the "Know Before You Owe" (KBYO) implementation is causing disruption in the origination and subsequent sale to investors of residential mortgage loans. Indeed, the initial impact on the mortgage market of the Rule becoming effective in early October 2015 has been noted in the press.[2]

As a practical matter, the Director's letter covered three topics:

- The CFPB's previously stated informal policy on examination standards for transactions conducted in the early months of KBYO implementation;
- Reminders of cure provisions contained in the KBYO rule itself and in the TILA; and
- Liability for violations of the KBYO rule.

1. Grace Period. The letter reiterated previous informal statements from the agency regarding supervision and oversight of residential mortgage originations post-KBYO implementation. The letter acknowledged that there will be "inadvertent errors" at first and the agency's examiners will be focused on whether originators have made good faith efforts to comply with the new rule. The letter stated, "All of the regulators have indicated that their examinations for compliance in the first few months of implementing the new rule will be corrective and diagnostic, rather than punitive."

2. Opportunities for Cure. The Director pointed out that the Rule itself contains a number of post-closing cure provisions for potentially erroneous disclosures. These are outlined in 12 C.F.R. 1026.19(f) and include:

    - Reissuance of the Closing Disclosure within 60 days of consummation to correct non-numeric clerical errors; and
    - Reissuance of the Closing Disclosure and refund of over-charged fees (outside specified tolerances) within 60 days of consummation.

    Importantly, the letter underscored the source of KBYO liability for erroneous disclosures. That is, consistent with existing TILA principles, any liability in a private right of action would be based on the final

[1] The CFPB's long-running effort of consumer outreach, industry feedback and rulemaking to comply with Congress's Dodd-Frank Act mandate to combine consumer disclosures in residential mortgage loan transactions is known as Know Before You Owe (KBYO).

[2] *American Banker*, December 22, 2015, "Existing Home Sales Plunge on TRID Issues," by Kate Berry.

Closing Disclosure issued in a transaction and not the early disclosure Loan Estimate or presumably non-final versions of the Closing Disclosure. The letter also reminded the industry that existing TILA cure provisions for correction of errors, at 15 U.S.C. 1640(b), and limitations on liability for unintentional “bona fide errors,” at 15 U.S.C. 1640(c), may be available to loan originators.

3. Liability. The letter represented the first time the CFPB has provided specific written guidance on potential liability under TILA and RESPA for disclosure violations under the Rule. In this regard, the letter made the following points:

   - For non-high cost loans, there is no general TILA assignee liability unless the violation is apparent on the face of the disclosure documents, citing 15 U.S.C. 1641(e).
   - TILA limits statutory damages for failure to provide TILA disclosures per 15 U.S.C. 1640(a).
   - Formatting errors and the like are unlikely to give rise to liability in private actions unless the formatting “interferes with the clear and conspicuous disclosure” of one of the mandatory TILA disclosures.
   - The mandatory TILA disclosures that give rise to TILA liability in private causes of action do not include either RESPA disclosures or the “new” Dodd-Frank Act disclosures, including Total Cash to Close and Total Interest Percentage.

So what are the key takeaways for mortgage market participants?

- If mortgage loan originators and others involved in the origination, financing and sales of mortgage loans are not familiar with the benefits of express KBYO disclosure cure provisions, now is the time to assess them.
- The letter explained that private rights of action for violations of the Rule are bounded by TILA and RESPA. It remains up to industry participants to determine how existing doctrines of liability flow through actual Closing Disclosure forms.[3] On its face, the letter could be construed to negate potential TILA liability for inaccuracies in many of the itemized figures disclosed in a typical Closing Disclosure. For example, it appears that pages 2 and 3 of the published form of Closing Disclosure are derived from RESPA rather than TILA, while pages 1 and 5 of the form depict a number of specific required TILA disclosures.[4]
- The letter appeared to deal only with private rights of action under TILA for erroneous or deficient disclosures. The letter did not address potential liability for disclosure timing deficiencies, which, under the Rule, may not be “curable” after the relevant time periods have expired. Moreover, other than reiterating the CFPB’s informal position on supervision early in the implementation period of the Rule, the letter did not address the CFPB’s view of potential liability arising from agency enforcement

[3] In connection with promulgation of the final Rule, the CFPB pointed out, as to specific provisions of the Rule, the statutory derivation of the agency’s rulemaking authority. The CFPB did not, however, comment specifically on liability in private rights of action, believing that the cited statutory authority for each of the integrated disclosure provisions “provide sufficient guidance for industry, consumers, and the courts regarding liability issues raised by the commenters.” 78 Fed. Reg. at 79757 (Dec. 31, 2013).

[4] *See* 15 U.S.C. 1638 for a listing of required TILA closed-end disclosures.

under TILA or “enforcement” of “unfair, deceptive or abusive” acts and practices (UDAAP) provisions.

- The letter made direct reference to investors’ concerns over “formatting and other minor errors,” saying that rejection of loans on that basis is out-of-line with the Rule. The Director assured industry participants that the CFPB will continue to work closely with industry representatives to monitor implementation, answer questions and address developments in the secondary market. In addition, it is likely that the CFPB will be forthcoming with additional guidance as the Rule continues to be digested by the market.

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